STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GLENN A. PRICE,

Defendant-Appellant.

UNPUBLISHED
December 11, 1998

No. 195878
Recorder's Court
LC No. 94-012415

Before: Cavanagh, P.J., and Murphy and White, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to ten to fifteen years' imprisonment for the second-degree murder conviction, and two years' imprisonment for the felony-firearm conviction, the sentences to run consecutively. We affirm.

Defendant's first claim of error is that there was insufficient evidence presented at trial to support his conviction for second-degree murder. We disagree. When reviewing the sufficiency of the evidence in a criminal case, we must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Vronko*, 228 Mich App 649, 654; 579 NW2d 138 (1998).

The elements of second-degree murder are "(1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse, or mitigation, (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm." *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996). In reviewing a claim of sufficiency of the evidence, the reviewing court may not make determinations of credibility because questions about the credibility of witnesses are left to the trier of fact. *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991). Any conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Circumstantial evidence and reasonable inferences arising from the evidence may

constitute satisfactory proof of the elements of the offense. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995).

In the present case, viewing the evidence in a light most favorable to the prosecution, sufficient evidence was presented from which a rational factfinder could conclude that defendant had the intent to create a very high risk of death with the knowledge that the act probably would cause death or great bodily harm. The evidence established that people were standing around at the time defendant discharged his weapon. One witness stated that he "saw so many people on the corner" and that the area in which defendant crashed his truck was residential. Another witness testified that at the time defendant pulled his gun out, people were standing on the corner and that everyone was outside because it was a nice day. This witness also stated that defendant never checked his line of fire, nor did he say or do anything to warn anyone that he was about to fire his weapon. Viewing this evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could conclude that defendant acted with the intent to create a very high risk of death with the knowledge that the act probably would cause death or great bodily harm. Therefore, sufficient evidence was presented at trial to convict defendant of second-degree murder.

Defendant also argues that he was denied a fair trial because of numerous instances of prosecutorial misconduct. We disagree. The test for prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997). Questions regarding prosecutorial misconduct are decided case by case, and we evaluate each question within the context of the particular facts of the case. *Id*.

Defendant first contends that the prosecutor misstated the legal standard for second-degree murder when she repeatedly discussed the Fatal Force Policy of the Detroit Police Department. However, because defendant failed to object to the alleged misconduct, our review is precluded unless a curative instruction could not have eliminated the prejudicial effect of the alleged misconduct or a miscarriage of justice would result if we did not review the issue. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because any prejudice resulting from the prosecutor's statements could have been eliminated by a curative instruction, we decline to review this claim and conclude that a miscarriage of justice will not result from our decision. In any event, the trial court instructed the jury that it was their job to apply the facts of the case to the law given to them by the trial court; thus, no prejudice resulted to defendant because of the prosecutor's comments.

Defendant next claims that in closing and rebuttal arguments, the prosecutor improperly relied on defendant's prior bad acts to denigrate his character and nature in an attempt to inject issues broader than his guilt or innocence of the charged offense, and improperly commented on defendant's character when his character was not in issue. However, defendant failed to object to the prosecutor's arguments at trial and thus failed to preserve this issue for appellate review. *Id.* Because a curative instruction could have eliminated any prejudice, we decline to review the issue further.

Defendant next argues that the prosecutor engaged in misconduct by ridiculing and mocking him with respect to his intelligence level. In *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995), our Supreme Court stated that prosecutors "must refrain from denigrating a defendant with

intemperate and prejudicial remarks." The test for such misconduct is whether the challenged comments denied defendant a fair and impartial trial. *Howard, supra,* 226 Mich App 544. Although such comments should be discouraged, we conclude that in the present case the challenged comments did not rise to such a level so as to deny defendant a fair and impartial trial.

Defendant next argues that the prosecutor engaged in misconduct when, during closing argument, she argued that a Detroit police officer's decision to investigate the case against defendant amounted to evidence that defendant had committed a wrong. Defendant maintains that such argument is tantamount to improper prosecutorial vouching. Although defendant objected to the prosecutor's remarks during closing arguments, the objection was based on relevancy and not impermissible vouching. To preserve an issue of prosecutorial misconduct for appellate review, defendant must *specifically* object to the prosecutor's argument. *People v Biggs,* 202 Mich App 450, 455; 509 NW2d 803 (1993). Because defendant on appeal does not argue that the prosecutor's remarks constituted error for the same reasons that he did below, this issue is not preserved. Thus, we conclude that any prejudice that might have resulted from the prosecutor's statement could have been eliminated with a curative instruction, and a miscarriage of justice will not result from our decision not to review the issue. Nonetheless, even had defendant specifically objected to the prosecutor's argument, the prosecutor's remarks did not rise to the level of error requiring reversal as they were in response to defense counsel's arguments. *People v Kennebrew,* 220 Mich App 601, 608; 560 NW2d 354 (1996).

Defendant next argues that the prosecutor engaged in misconduct by improperly commenting on his right to remain silent and obtain counsel. Specifically, defendant claims that the prosecutor's questions about whether defendant gave the police a description of the person who he claimed had attempted to rob him improperly led him to admit that he had invoked his right to remain silent and obtain counsel. In reviewing a claim that a prosecutor improperly commented on a defendant's right to remain silent, we must analyze the context surrounding the prosecutor's reference to the constitutional right. *People v Fields,* 450 Mich 94, 110-111; 538 NW2d 356 (1995).

A review of the colloquy between the prosecutor and defendant reveals that defendant initially testified that he was not given the opportunity to give a description of the person and, in fact, was prevented from giving a description. However, further questioning by the prosecution revealed that defendant was not prevented from making a statement. The prosecutor's questioning revealed that defendant chose not to make a statement because he had invoked his right to remain silent. Here, the prosecutor fairly responded to defendant's claim that he was somehow prevented from giving a description. Had the prosecutor not challenged defendant's assertion that he was not permitted to give a description, the jury could have been left with the impression that the police would not allow defendant to make a statement. As the prosecutor's questioning revealed, this is not what occurred. Therefore, the prosecutor did not improperly comment on defendant's right to remain silent.

Defendant's final claim of prosecutorial misconduct is that the prosecutor improperly commented, during cross-examination of defendant and closing argument, that since defendant was present during the trial, he had the opportunity to fabricate his testimony. Although defendant cites *Agard v Portuondo,* 117 F3d 696, 709 (CA 2, 1997), where the Second Circuit Court of Appeals

held that "[i]t is constitutional error for a prosecutor to insinuate to the jury for the first time during summation that the defendant's presence in the courtroom at trial provided him with a unique opportunity to tailor his testimony to match the evidence," the prosecutor in this case did not challenge defendant's credibility in this manner for the first time during closing argument. Rather, the prosecutor had already broached the matter during her cross-examination of defendant. Thus, this case can be distinguished from *Agard* in this regard. Moreover, as defendant notes in his brief on appeal, our Supreme Court expressly rejected this claim of error in *People v Buckey*, 424 Mich 1, 18; 378 NW2d 432 (1985). Therefore, this claim cannot succeed on appeal.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Helene N. White